IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.6330 OF 2006

Pimpri Refugee Industrial Co-operative Society, Pimpri, Pune-17 having its registered office at B-32/139, Pimpri Colony, Pune-17 through its chairman/secretary, Pimpri Refugee Industrial Co-operative Society, Pimpri B-32/139, Pimpri, Pune-17. .... Petitioner

- Versus -

Parmanand Bhimandas Talreja, Age 62 years, Occ: Business, residing at LIG Colony No.51/5 Sector No.25, Sindhunagar, Nigdi, Pradhikaran, Pune 044. .... Respondent

Sarvasri D.B. Lonkar with Abhaykumar Apte for the Petitioner.

Sarvasri P.S. Dani with S.S. Kanetkar for the Respondent.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: OCTOBER 06, 2006

ORAL JUDGMENT:

1. Rule. By consent, the rule made returnable forthwith.

2. Heard. The Judgment passed by the Court below and confirmed by the lower Appellate Court is sought to be challenged on three grounds, firstly, that no Notice under Section 164 of the Maharashtra Co-operative

Societies Act, 1960, hereinafter called as "the said Act" was issued before the filing of the suit, secondly, the Court could not have relied upon the agreement dated 9-5-1999 as it was not a registered document and, thirdly, the respondent could not have filed a suit for restoration of possession claiming tenancy rights without challenging the resolution passed by the petitioner-society cancelling the agreement between the parties dated 9-5-1999.

3. As regards the first ground of challenge, undisputedly, Section 164 of the said Act provides that no suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.

4. Undoubtedly, in terms of the said Section 164, therefore, it is necessary for the plaintiff to serve the notice prior to the filing of the suit. It is also necessary for the plaintiff to specify in the plaint that he has delivered or left such notice at the address

of the defendant. Undoubtedly, there was a statement in the plaint about the issuance of notice dated 24-12-1999 and failure on the part of the defendant either to comply with the notice or to send any reply thereto.

5. Though it cannot be disputed that no suit can be instituted against a society without serving proper notice on the society, at the same time, it is also to be borne in mind that in the absence of any such notice if the suit is filed, it is necessary for the defendant to raise the point in that regard in the written statement and, more particularly, when there is assertion on the part of the plaintiff that a notice was issued to the defendant and there had been neither compliance thereof nor any reply thereto. Whether the notice was in consonance of the provision of Section 164, would be another issue.

6. It is not in dispute that the petitioner never raised the issue regarding the absence of notice under Section 164, either in the written statement or even at the appellate stage. It cannot also be disputed that the requirement of notice under Section 164 can be waived and the waiver can be specific or implied. It is settled position in law that when a statute requires a notice should precede the filing of a suit, the compliance of such statutory provision is mandatory, but

at the same time, the right thereof can be waived by the party for whose benefit the provision regarding pre-suit notice has been made, and further that the waiver can be expressly made as also impliedly. While dealing with the provision of law comprised under Section 30 of the C.P.C., the Apex Court in **Dhian Singh Sobha Singh and another v. Union of India,** reported in AIR 1958 SC 274 as well as the Full Bench of our High Court in **Vasant Ambadas Pandit v. Bombay Municipal Corporation and others,** reported in AIR 1981 Bombay 394 had held that the notice can be lawfully waived. Undoubtedly, the waiver has to be established by the plaintiff. However, the same can be presumed when inspite of specific averment in the plaint regarding service of notice, the sufficiency of the notice is not challenged by the defendant till the disposal of the appeal.

7. In **Erandol Taluka Gramodyog Utpadak Sahakari Society v. M/s. Sunil Waste Corporation,** reported in 1970 Mh.L.J. 923, the learned single Judge in a case where no notice under the said section was issued and the suit was filed against the co-operative society and was decreed and further that no appeal was filed against such decree and the objection was sought to be raised about the absence of notice only in the execution proceedings, it was held that the objection to execution of such decree was not maintainable as non-compliance of

the provision of Section 164 of the said Act is not a defect which takes away the inherent jurisdiction of the Court to try the suit or pass the decree. It was further observed that in such a case the decree would be contrary to the provisions of law but would not be a decree passed by the Court without jurisdiction and though the defect may affect the maintainability of the suit, it does not affect the inherent jurisdiction of the Court to entertain and decree the suit. While highlighting the distinction between the decree which is a nullity and the decree which is passed over-looking certain provisions of law, it was held that in the latter case the same would not necessarily make the decree a nullity. Obviously the absence of notice prior to the filing of the suit would not affect the jurisdiction of the civil Court to deal with the suit and to pass the decree.

8. Undisputedly, the point regarding the absence of notice was neither raised before the trial Court nor before the lower Appellate Court. The defendant knowing well about non-issuance of the statutory notice did not raise any objection in the written statement nor complained about non-framing of issue about the non-maintainability of the suit on that count and further fully participated in the proceedings in the suit as well as in the appeal, hence it would not be

open to the defendant to raise the plea about the absence of such notice for the first time in the writ proceedings to non-suit the plaintiff.

9. The contention on the basis of Order 7, Rule 11(a) of the C.P.C. would also be of no help to the petitioner to invite interference in the impugned order in writ jurisdiction. The contention relates to absence of cause of action. In fact, the provisions of Order 7, Rule 11 of the C.P.C. are not at all attracted in the facts of the case, besides the same cannot be sought to be invoked after disposal of the suit. The Order 7, Rule 11 of the C.P.C. which speaks of rejection of the plaint on the grounds specified thereunder nowhere provides for rejection of the plaint for non-maintainability of the suit on account of insufficiency of the notice issued to the defendant prior to the filing of the suit. Once, the plaintiff issues a notice before the filing of the suit and makes averment in that regard in the plaint, it cannot be said to be a case of absence of disclosure of cause of action in the plaint. Any suit can be instituted on account of there being cause of action to obtain the relief asked for in the suit. A statutory notice for filing of the suit is merely to put the defendant on guard so that it can avoid the lis by complying with the demand of the plaintiff based on the cause of action disclosed in the

notice. Being so, the notice is merely to attempt to avoid the litigation and by itself cannot be a cause of action and hence Clause (a) of Rule 11 of Order 7 cannot be attracted in such a case. Secondly, the provisions of Order 7, Rule 11 of the C.P.C. are essentially in relation to rejection of the plaint and the power in that regard to be exercised prior to final disposal of the suit. In other words, the objection in that regard can be entertained either before the trial Court or before the lower Appellate Court. Once the Appellate Court finally decides the matter, what remains thereafter is the decree for execution. The proceedings in writ jurisdiction under Article 227 of the Constitution cannot be considered as continuation of the proceedings in a suit or an appeal after the final disposal of the appeal arising out of final decision in the suit.

10. The decision in **C.F. Marconi v. Madhav Co-operative Housing Society Ltd.,** reported in 1985 (2) Bom.C.R. 357, is clearly distinguishable. Therein the point regarding absence of notice was specifically raised and a preliminary issue in that regard was framed and decided. Besides, there was no notice at all issued in the case prior to filing of the suit inspite of the fact that the suit claim was in respect of the act touching the business of the society.

11. As regards the second ground of challenge, it is well-settled that the document of the nature in question can be relied upon for collateral purposes and the suit itself being not based on the agreement dated 9-5-1999 but on the basis of the claim of tenancy rights, and the said document being one of the pieces of evidence in support of the said claim, merely because it was not registered cannot be fatal to the decree passed in favour of the respondent.

12. As regards the third ground of challenge, undisputedly, the suit itself was for restoration of possession of the premises on the basis of the claim of tenancy. Merely because on a unilateral decision of the petitioner-society to cancel the agreement dated 9-5-1999 having not been stayed, that cannot be a justification for interference in the impugned decree which has been passed on the basis of the concurrent findings arrived at by the Courts below.

13. In the result, therefore, there being no jurisdictional error disclosed in the impugned order and no case made out for interference in exercise of power under Article 227 of the Constitution of India, the petition fails and is dismissed. The rule is discharged with no order as to costs.

(R.M.S. Khandeparkar, J.)

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